Statements by the United States at the Meeting of the WTO Dispute Settlement Body

Geneva, January 26, 2015

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

   A. UNITED STATES – SECTION 211 OMNIBUS APPROPRIATIONS ACT OF 1998: STATUS REPORT BY THE UNITED STATES (WT/DS176/11/ADD.145)

- The United States provided a status report in this dispute on January 15, 2015, in accordance with Article 21.6 of the DSU.

- Several bills introduced in the current U.S. Congress in relation to the DSB recommendations and rulings in this dispute would repeal Section 211. Other previously introduced legislation would modify it.

- The U.S. Administration will continue to work on solutions to implement the DSB's recommendations and rulings and to resolve this matter with the European Union.

Second Intervention

- We appreciate Members' comments noting recent bilateral developments between the U.S. and another Member. However, the DSB is not the appropriate forum for discussing bilateral relations between Members generally, and the United States reminds Members that the parties to this dispute are the United States and the European Union. That said, we understand that some Members may have questions about this issue, and as we stated when this issue came up in the TPR, we look forward to answering Members' questions about this matter in the appropriate forum in the months ahead.

- Additionally, I would like to respond to the concerns expressed by Members about the systemic implications of this dispute on the system. The facts simply do not justify such systemic concerns. The United States has come into compliance, fully and promptly, in the vast majority of its disputes. In fact, we have announced the resolution of other disputes at recent DSB meetings.

- As for the remaining few instances where we have not yet been entirely successful, the United States has been working actively towards resolving such matters, and we will continue to work to implement the DSB's recommendations and rulings in this dispute.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

B. UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN: STATUS REPORT BY THE UNITED STATES (WT/DS184/15/ADD.145)

- The United States provided a status report in this dispute on January 15, 2015, in accordance with Article 21.6 of the DSU.

- The United States has addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue.

- With respect to the recommendations and rulings of the DSB that have yet to be addressed, the U.S. Administration will work with the U.S. Congress with respect to appropriate statutory measures that would resolve this matter.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

C. UNITED STATES – SECTION 110(5) OF THE US COPYRIGHT ACT: STATUS REPORT BY THE UNITED STATES (WT/DS160/24/ADD.120)

- The United States provided a status report in this dispute on January 15, 2015, in accordance with Article 21.6 of the DSU.

- The U.S. Administration will continue to confer with the European Union, and to work closely with the U.S. Congress, in order to reach a mutually satisfactory resolution of this matter.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

D. EUROPEAN COMMUNITIES - MEASURES AFFECTING THE APPROVAL AND MARKETING OF BIOTECH PRODUCTS: STATUS REPORT BY THE EUROPEAN UNION (WT/DS291/37/ADD.83)

- The United States would like to thank the European Union ("EU") for its status report and its statement today.

- The EU measures affecting the approval of biotech products are seriously disrupting trade in agricultural products between the United States and the EU.

- The EU failed to approve a single new biotech product in 2014.

- Furthermore, based on public statements by EU officials, it appears that the EU has decided not to make any further approvals until the EU conducts yet another re-examination of EU biotech approval measures.

- The United States fails to see how a re-examination of existing approval measures could provide a scientific basis for not making biotech product approvals. Indeed, many of the long-pending products have successfully passed comprehensive safety assessments by the EU's scientific authority.

- The United States is also concerned by biotech legislation recently approved by the European Parliament. According to reports, the legislation would allow individual EU member states to ban or restrict biotech products approved at the EU-level, even where the EU member state has no scientific basis for doing so.

- We would urge the EU to address these matters.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

E. UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN SHRIMP FROM VIET NAM (WT/DS404/11/ADD.31)

- The United States provided a status report in this dispute on January 15, 2015, in accordance with Article 21.6 of the DSU.

- As we have noted at past DSB meetings, in February 2012 the U.S. Department of Commerce modified its procedures in a manner that addresses certain findings in this dispute.

- The United States will continue to consult with interested parties as it works to address the other recommendations and rulings of the DSB.

2. UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. STATEMENTS BY THE EUROPEAN UNION AND JAPAN

- As the United States has noted at previous DSB meetings, the Deficit Reduction Act – which includes a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – was enacted into law in February 2006. Accordingly, the United States has taken all actions necessary to implement the DSB's recommendations and rulings in these disputes.

- We recall, furthermore, that the EU, Japan, and other Members have acknowledged that the Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007, which is over seven years ago.

- We therefore do not understand the purpose for which the EU and Japan have inscribed this item on the agenda today.

- With respect to comments regarding further status reports in this matter, as we have already explained at previous DSB meetings, the United States fails to see what purpose would be served by further submission of status reports which would repeat, again, that the United States has taken all actions necessary to implement the DSB's recommendations and rulings in these disputes.

- Indeed, as these very WTO Members have demonstrated repeatedly when they have been a responding party in a dispute, there is no obligation under the DSU to provide further status reports once a Member announces that it has implemented those DSB recommendations and rulings, regardless of whether the complaining party disagrees about compliance. In fact, one Member that used to call for U.S. status reports under this agenda item is not currently supplying such reports itself in another matter being raised today under item 4, given its position that it has taken all actions necessary to comply.

3. CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

A. STATEMENT BY THE UNITED STATES

- The United States continues to have serious concerns that China has failed to bring its measures into conformity with its WTO obligations.

- The situation unfortunately has not changed since the United States first began raising this matter in the DSB and despite repeated interactions between the United States and China. China continues to maintain a ban on foreign suppliers of electronic payment services ("EPS") by imposing a licensing requirement on them, while at the same time providing no procedures to obtain that license.

- As a result, an enterprise located in China remains the only EPS supplier that can operate in China's domestic market.

- To comply with China's WTO obligations, and despite China's assertions in previous DSB statements, China must adopt the regulations necessary for allowing foreign suppliers to operate in China.

- The United States takes note of the statement last October by China's State Council that China will open the EPS market to qualified suppliers. Three months have now passed since the State Council announced its decision, and once again we are waiting. We therefore look forward to prompt issuance of the regulations needed to follow through on the announcement that was made by the State Council.

6. ARGENTINA – MEASURES AFFECTING THE IMPORTATION OF GOODS

A. REPORT OF THE APPELLATE BODY (WT/DS438/AB/R) AND REPORT OF THE PANEL (WT/DS438/R AND WT/DS438/R/ADD.1)

B. REPORT OF THE APPELLATE BODY (WT/DS444/AB/R) AND REPORT OF THE PANEL (WT/DS444/R AND WT/DS444/R/ADD.1)

C. REPORT OF THE APPELLATE BODY (WT/DS445/AB/R) AND REPORT OF THE PANEL (WT/DS445/R AND WT/DS445/R/ADD.1)

- The United States would like to thank the Panel, the Appellate Body, and the Secretariat staff assisting them for their hard work in this dispute. We also would like to thank our co-complainants, the European Union and Japan, for the very close and fruitful collaboration throughout this process.

- The adoption of the panel and Appellate Body reports by the DSB today will bring to a close this chapter of a dispute that has taken more than two years to reach this point. And in fact the United States and other Members had sought for many years prior to that to resolve through dialogue their concerns with Argentina. With the adoption of these reports, it is our desire and expectation that we can work together to achieve a resolution of this matter that brings Argentina's import licensing measures into compliance with WTO rules.

- The United States would briefly recall the nature of the measures involved in this dispute, given the importance of the findings by the panel and Appellate Body.

- First, the United States, together with our co-complainants, alleged that Argentina had imposed a non-automatic, non-transparent, and highly discretionary import licensing system, the DJAI,[1] that restricted imports in contravention of numerous provisions of the GATT 1994 and the Import Licensing Agreement. The Panel focused its analysis on Article XI of the GATT 1994, and found this measure to be an import restriction that breached Argentina's Article XI obligations. The Appellate Body has now rejected Argentina's appeals and affirmed the Panel's findings entirely.

1 Declaración Jurada Anticipada de Importación.

- In so doing, both the Panel and Appellate Body have soundly rejected Argentina's arguments that Article VIII of the GATT 1994, which sets out hortatory provisions relating to customs formalities, serves as an exception to Article XI. There was no textual basis for this argument, and the Appellate Body rightly pointed to a number of other provisions in the GATT 1994 explicitly setting out exceptions from the obligations in Article XI as relevant context. Thus, to the extent obligations in both Articles may apply to the DJAI, they would apply cumulatively.

- The Panel and the Appellate Body have agreed with the co-complainants that the DJAI has a limiting effect on imports through its discretionary, non-automatic nature, the uncertainty it creates for traders, its imposition of export criteria, and the burdens it places on importers.[2] To come into conformity with WTO rules, Argentina will need to reform these aspects of any licensing system it applies.

- The United States and our co-complainants also challenged an unwritten measure imposed by Argentina consisting of restrictive trade-related requirements on importers,[3] often as a condition for giving import authorization under the DJAI. The Panel and Appellate Body agreed that the complainants had demonstrated the existence of this measure, undertaken in pursuit of a policy of so-called "managed trade" or import substitution set out by high-level government officials, and that this unwritten measure itself also breached Article XI of the GATT 1994. Continued imposition of these restrictions on importers would therefore not be consistent with WTO rules.

- Although this is not the first time an unwritten measure has been challenged in WTO dispute settlement, the occurrences are relatively rare. We applaud the Panel's careful and very detailed treatment of the substantial evidence advanced by the co-complainants to demonstrate the existence of this measure, which spans dozens of pages of the panel report.[4]

- Against this overwhelming evidence, Argentina sought to assert what might be described as a "technical" defense to try to shield its unwritten measure from challenge. In particular, Argentina attempted to invoke the Appellate Body's articulation of the elements needed for an "as such" challenge to an alleged "methodology" measure in a different dispute and apply that here to an entirely different type of measure. Both the Panel and Appellate Body rightfully rejected that effort. In that regard, we would draw Members' attention to the Appellate Body's clear and commonsense explanation that not every measure will be of the same nature, and that what is required of a complainant is to

2 *See* Panel Report, para 6.474; Appellate Body Report, paras. 5.284-5.285.
3 *See* Panel Report, para. 6.221, Appellate Body Report, paras. 4.5-4.11.
4 *See, e.g.*, Panel Report, paras. 6.155-6.341.

bring forward sufficient evidence to demonstrate the existence of the measure complained against.[5]

- The Appellate Body has also rejected the notion that every challenge to a measure that may continue to exist until withdrawn must be framed as an "as such" challenge or that such a measure must be shown to have "general" or "prospective" application.[6] To have introduced such requirements, particularly in the context of a challenge to an unwritten measure, would have run the risk of shielding from WTO scrutiny and disciplines certain acts by Members, such as decisions not reduced to accessible legal instruments.

- Thus, in substance, the United States is pleased with the high quality reports produced by the Panel and the Appellate Body in this dispute, which we expect will contribute importantly to achieving a solution to this matter. We also note that this dispute involves a number of import licensing matters of concern to Members, and these reports should serve as important references for Members applying such measures.

- We do also wish to touch briefly on a regrettably familiar procedural matter. We note that, for the fifth time in the last six disputes, the Appellate Body has not circulated its reports within 90 days as mandated in Article 17.5 of the DSU.

- The Appellate Body also continued its recent deviation from its pre-2011 practice and failed to consult with the parties or seek their agreement when it became clear that it would be unable to meet the DSU deadline. Instead, the Appellate Body yet again merely informed the parties via form letter that it would not circulate its report within the prescribed time limit.

- It would also appear that a step has been taken backwards with respect to transparency, as compared with other reports, in that this report does not even mention this issue in its introductory section. Accordingly, a Member that had not seen the Article 17.5 notice[7] and only reading the report would not be aware of the circumstances surrounding the timing of this report's circulation.

- As previously noted, these types of actions, in the context of a clear and mandatory DSU provision, do not contribute to a strengthening of the rules-based system. And they are particularly disappointing in light of the fact that Argentina, the United States, and Japan clearly indicated in a joint letter sent to the Appellate Body and circulated to the DSB that they would have been willing to positively consider a request from the Appellate Body

5 *See* Appellate Body Report, paras. 5.103-5.104, 5.108.
6 *See* Appellate Body Report, paras. 5.109-5.110.
7 Communication from the Appellate Body, 24 November 2014 (WT/DS438/17, WT/DS444/15, WT/DS445/16).

for extra time to circulate its report given the circumstances and that they would consider a late report to be deemed consistent with Article 17.5 of the DSU.[8]

- As we have noted since this issue first came to the DSB's attention, the United States would encourage Members and the Appellate Body to work together to find a solution to this matter, such as a return to past practice. A situation in which Members continue to be informed of and react to circulation of reports in circumstances such as these only further contributes to a lack of transparency and a lack of predictability surrounding the issue.

Second Intervention

- The United States would like to comment again on a procedural matter that numerous Members have commented on today, including Australia, Brazil, Chinese Taipei, Canada, Japan, India, the EU, and Norway. It has been useful to have this discussion related to this important systemic issue.

- One comment that has been made that I would like to address is the issue of past practice with respect to consultations and agreement. In that regard, it may be illuminating to look at paragraph 14 of the Appellate Body report in the *U.S – Upland Cotton (Article 21.5)* dispute, which describes the Appellate Body's consultations with Brazil and the United States in that dispute when it became clear that the report could not be circulated within 90 days. In particular, that paragraph reads: "After consultation with the Appellate Body Secretariat, Brazil and the United States agreed, in a joint letter dated 19 March 2008, that it would not be possible for the Appellate Body to circulate its Report in this appeal within the 90-day time-limit referred to in Article 17.5 of the DSU. Brazil and the United States agreed that additional time was needed because of the complexity of the issues arising in the appeal and the difficulties encountered by the Appellate Body in scheduling the oral hearing. Brazil and the United States accordingly confirmed that they would deem the Appellate Body Report in these proceedings, issued no later than 2 June 2008, to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU."

- That paragraph from the Appellate Body report describes merely one example of 14 consecutive disputes where the Appellate Body consulted with and reached agreement with the parties when it was unable to circulate its report within 90 days. It is also a perfect example of where this issue was described in a transparent manner in the

8 Joint Communication from Argentina and the United States, WT/DS444/16(5 December 2014); Joint Communication from Argentina and Japan, WT/DS445/17 (5 December 2014).

Appellate Body report, which is the practice that we are suggesting the Appellate Body return to today.

- In fact, as we noted before, we would continue to encourage Members to work together and to work with the Appellate Body to return to the pre-2011 practice. This will help enhance the credibility of the system and restore needed transparency and predictability. We look forward to further discussions with Members on this topic.